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File No. O. Constitution 57

Legal Department Pt. I

A **BRANCH**

Subject:— Opinions under the Constitution of India

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C O N T E N T S.

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5.	R.I.No.12686/22.7.50 O.No.1267/19.1.51.	Re: Article 258(3) read with article 73 of the Constitution of India,the provisions of which are similar to those of Sec.124 read with Sec.8 of the G. of India Act, 1935) Question whether the G. of India can be asked to share the expenditure incurred by the State Govt. on Tribunals and Courts established and maintained for the purposes of the Industrial Disputes Act, 1947 or the Bombay Industrial Relations Act, 1946.	
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7.		Re: A note prepared by the R.L.A. for H.P. on the following point Article 79A of the Constitution which refers to the Secretariat of the Dominion Parliament and article 163A which refers to the Secretariat of the State Legislature.	

8.	R.I.No.1090/18.1.51. O.No.2279/6.2.51.	Re: Article 15(1) of the Constitution of India. Grant of scholarships to students, of this State.
9.	O.No.2269/6.2.51.	Question whether it is necessary to empower superintendents to sign orders of Government. Rules of Business, rule 12; Article 166 of the Constitution of India.
10.	O.No.17197/5.12.50.	Re: Endorsement addressed to H.D., forwarding G. of I. Ministry of Laws letter No.F22-IV/50-L dated 2.12.50, regarding proposed amendment to the "reference" provisions of the civil and criminal Procedure Codes.
11.	O.No.17196/5.12.50.	Re: Letter addrewsed to the Secretary to the G. of India, Ministry of Law acknowledging the receipt of their letter No.F22-IV/50-L dated 2.12.50.
12.	R.I.No.667-Confl/19.9.50; O.No.187-Confl/20.2.51.	Re: Question regarding age limit in respect of appointment of a judge of the City Civil Court B.C.S.Rules. rules 2 and 32 Articles 233, 234 and 236 of the Constitution of India
13.	O.No.1536/24.1.51.	Re: Freedom of speech and publication and exhibition of films. Article 19(1)(a) of the Constitution of India.
14.	O.No.2524/9.2.51.	Re: Part III of the Constitution of India which relates to "fundamental rights. Articles 15(1) and 19 of the Question regarding compelling by law any minority to operate through the agency of cooperative societies.
15.	O.No.3071/19.2.51.	Re: Article 15(1) of the Constitution of India Grant of Scholorships to students on the grounds of religion, race, caste, sex, place of birth or any one of them.
16.	O.No.3850-A/7.3.51.	Question whether Shri Akhtar Hussain Mirza, M.L.A., who has left India and gone over to the Pakistan in April 1950 and has been declared as an evacuee under the Administration of evacuee Property Act, 1950, has incurred the disqualification under article 191(1)(d) of the Constitutiin of India.

17.	O.No.3705/3.3.51-	Re: Travelling allowances to H.Ms., H.C. and M.S. Question whether any chan,e in the allowances can be made by executive orders in view of articles 164(5) and 186 of the Constitution of India.
18.	O.No.2761/13.2.51.	Question whether the primary School teachers can stand for election to the Legislature. Article 173 and 191(1) of the Constitution of India.
19.	O.No.4014/10.3.51.	Re: Acquiring of a plot by the G. of I. in exercise of the powers conferred on them under S c.5(1) of the Requisitioned Land(continuance) of Power) Act, 1947, which was actually acquired by Bombay Govt. on behalf of G. of India. Question regarding which Govt. can be said to be the appropriate Govt. in respect of requiring the lands in questions under Sec.5(1) of the Act. Proposed to entrust the Govt. of Bombay under article 258(1) of the Constitution of all functions which are necessary to be performed by the Central Government in relation to the acquisition of the plots in question.
20.	O.No.5306/19.4.50	Re: Action require to be taken by various departments of the Secretariat in connection wit: the new Constitution of India.
21.	O.No.42/18.2.50.	Re: Salaries and allowances to be paid to the Speaker and the Deputy Speaker of the Legislative Assembly and to the Chairman and the Dy. Chairman of the Legislative Council. Article 186 of the Constitution of India.
23.	O.No.12476/31.8.50.	Re: Articles 208(1) and 209 of the Constitution. Making of Rules for the purpose of timely completion of financial business. (Please also see R.L.A.'s No.5306/19.4.50 item No.20 above)
22.	O.No.3176/7.3.50.	Re: Article 31(6) of the Constitution. Provision in the . which provides for the certificate of the President which is in the nature of a temporary provisions intended to remove doubts regarding enactments passed within a period of 18 months before the Constitution came in to force

24.	O.No.4654/22.3.51.	Re: Running of a School by Baroda Govt. before merger and of the trust fund. Agreement entered into between the trustees and the Baroda Govt. Question whether the Bombay Govt. after the merger of the State is bound to recognise the agreement and whether Govt. can run the School with Govt. aid in view of the provisions in the Constitution that Govt. cannot offer aid to a school which admits only girls of a particular community.
25.	R.I.No.4076/28.2.51.	Re: Copy of Govt. letter P. & S.Department to the Government of India Ministry of Home Affairs No.9721/34-E dated 20.12.50. Re: Convention to be followed in regard to appointment of Ministers.
26.	R.I.No.3077/13.3.51.	Re: Copy of an express letter from the Government of India Ministry of Home Affairs, No. 33/39/50-F.II dated 29.1.51. Re: Acquisition by foreigners of India citizenship under Article 5(c) of the Constitution of India.
27.	O.No.290-Confl/16.3.51.	Question whether in the case of a permanent officer taken over from a merged state who serves the Bombay Government for a number of years but remains unabsorbed on account of administrative reasons, such officer can be discharged on the ground of inefficiency by giving him a notice but without giving him the benefit of an enquiry into the allegations against him, as contemplated by article 311(2) of the Constitution of India.
28.	O.No.295-Confl/19.3.51.	Re. .....do.....
29.	O.No.5204/2.4.51.	Question whether the view taken by F.D. that the provisions made on account of T.A. and honorarium to the President and member of the Bombay Revenue Tribunal should be treated as voted in view of the provisions of the Constitution of India is correct.
30.	R.I.No.945/16.1.51. O.No.4756/26.3.51.	Re: Request by Secretary, Home Department to R.L.A. to state the law dealing with objectionable speeches against individual ministers of Government obtaining in U.K. and America.

31.	O.No.200/4.1.51.	Re: Use of English Language for all the official purposes of the Union for a period of 15 years from the Commencement of the Constitution- Clause (2) of Article343 of the Constitution.
32.	R.I.No.24331/9.12.50. O.No.6197/17.4.51.	Re: Use of regional languages in official business. Article 345 of the Constitution of India.
33.	O.No.6335/20.4.51.	Re: Question whether H.M. can become the member or vice president of any private Institution.
34.	O.No.234-Confl/2.3.51.	Re: Legislation in respect of Public Order Article 19 of the Constitution of India.
35.	R.I.No.20287/7.11.50 O.No.5316/3.4.51.	Re: Educational Institutions run on funds given in trust to Government. Question whether lump sum grants given to schools are in the nature of "aid" Act. 29 of the Constitution.
36.	O.No.6089/16.4.51.	Re: Authorization of camp commandants. Article 299(1) of the Constitution of India. (Please see R.L.A.'s No.7302/8.5.51. file O.Transfer of Property/51)
37.	R.I.No.4473/7.3.51. O.No.6496/23.4.51.	Re: Issue of an order by Govt. under article 161 of the Constitutions granting pardon to a person who was convicted and sentenced to six months' R.I. Question whether the action taken by Govt. is correct.
38.	R.I.No.6654/4.4.51. O.No.6707/26.4.51.	Re: Short-term appointments of the Chairman and members of the P.S.Commission. Question whether the commission can be said to be properly constituted if it is left without a chariman Article 316(2) and 318 of the Constitution of India.
39.	R.I.No.7832/16.4.51. O.No.6979/2.5.51.	Question whether reservation of seats in educational institutions for persons from outside the State and also for students from overseas constitutes discrimination in view of the decision by the Supreme Court in the communal G.O. case. Articles, 14,15,29(2) of the Constitution of India.

40.	O.No.6820/28.4.51.	Re: Government of India's proposal to enter into a treaty of commerce and navigation with Iran. Draft of Treaty given to the Iranian Government. Copy of three articles of sent to Bombay Government to consider the efficacy of the proposed draft clause in ensuring reciprocal treatment against the Iranians in India for disabilities suffered by Indians in Iran. Articles 14, 15, 16, 19, 21, 29 and 30 and 51 and 253 of the Constitution of India.
41.	R.I.No.7834/16.4.51. O.No.6907/1.5.51.	Re: Application from Mrs. Annie Gobby for an Passport to visit her daughter who has migrated to Palestine. The ~~Applicant was born in~~ Applicant was born in Baghdad and migrated to India and has been since that time a resident of Bombay. She last resided with her husband in France upto 1936 in which year her husband left France for Malaya. They have not resided together since that year. The Chief Presidency Magistrate granted her Domicile Certificate. Question as to the domincile of a wife during her marriage follows the domicile of her husband; whether she can be given an Indian Passport while her husband is an Iraqui National. Article 5(c) of the Constitution.

ABL 11-4-51

Office of the R.L.A.

I am unable to agree with the High Court on the two suggestions made by them. There is no reason why the references should be limited only to provisions of Acts and Ordinances instead of all enactments. The reason underlying the proposed amendment is that inferiour Courts like those of Magistrates' and Civil Judges' are not competent to decide upon questions regarding the validity of laws; and, as the Government of India have pointed out in their letter, in future all questions of such validity will generally arise only in reference to the provisions of the Constitution. I might mention that there is no such thing as general constitutional law, as the Chief Justice seems to have imagined in the recent case of Road Transport. The validity of a law under a written Constitution can be judged only with reference to its provisions, and in effect, therefore, an issue regarding the validity of a law will ordinarily raise constitutional points. The word — "enactment" has been defined in the General Clauses Act, 1897 to include regulations and also any provision contained in any Act or Regulation. The General Clauses Act, 1897, also includes Ordinances within the term "Act". The position is not so clear with reference to the Bombay Ordinances; see section 31 of the Bombay General Clauses Act, 1904. I would, therefore, suggest that the Government of India may requested to add a definition of the word "enactment" for the purposes of the proposed law so as to include therein all Acts, Ordinances and Regulations made in pursuance of the powers given by the Constitution and any provision thereof.

2. On the second point also, I would not agree that the proposed amendment should be complementary to Article 228 of the Constitution, and that the

subordinate courts should be compel'ed to make the references only when the questions as to the validity of an Act or Ordinance, the determination of which is necessary, involves a question of law as tot the interpretation of the Constitution. As explained above, such questions are likely to arise in almost all cases where the validity of laws is being canvassed; and to day under Order 27A the Civil Court is bound to give notice to the Advocate General or the Attorney General, as the case may be, in cases which involve a question of law as to the interpretation of the Constitution, and thereupon the appropriate Government can make an application to the High Court under Article 223. The proposed amendment does not substantially go beyond the present law except that it makes it obligatory upon the Subordinate Courts, Criminal or Civil, to make a reference to the High Court in such cases.

Sd/- P.M.Lad.
4.1
Remembrancer of Legal Affairs.

U.R. to H.D. No. 308, dated 5th January 1951.

V.M.D./17.7

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5

Office of the R.L.A.

"Offence" in Articles 72 and 161 denotes a thing which is punishable either under the Indian Penal Code or under any special or local law." It impliedly follows that punishment must follow the conviction of a person of any offence by a Court of Law. Both the Article 72 and Article 161 would not apply to a disciplinary action taken against a Government servant under appropriate rules governing such servants. The view taken by Political and Services Department is correct.

Sd/- P.M.Lad.
6.1
Remembrancer of Legal Affairs,

U.R. to P. & S.D. No. 467, dated the 8th January 1951.

V.M.D./17.7

Lo.

Office of the R.L.A.

Article 15(1) of the Constitution forbids discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Assuming that there is discrimination in reserving seats in educational institutions for persons from outside the State and also for students from overseas, such discrimination is not based only on place of birth but is really based upon the qualification of domicile or residence in the State. So long as it is made clear that the reservation is for persons who do not ordinarily reside in the State but who reside elsewhere in India or who reside overseas, Article 15(1) will not be attracted. Moreover, it would be profitable to await the decision of the Supreme Court in the Madras Communal G.O. case, so that the legal position as to whether such reservation constitutes discrimination may also get finally classified.

Sd/- P.M.Lad.
9.1
Remembrancer of Legal Affairs.

V.M.D./17.7
40.

Office of the R.L.A.

It appears that Shri Ephrain Ezekiel Sherbanee has been granted a domicile certificate by the Chief Presidency Magistrate on 3rd July 1950 and has applied for the grant of an Indian passport. The question raised for R.L.A's consideration is whether he is entitled to the Indian citizenship under article 5 clause (c) of the Constitution of India.

2. Article 5 of the Constitution of India provides that at the commencement of this Constitution, every person who has his domicile in the territory of India and who has been ordinarily resident in the territory of India for not less than 5 years immediately preceding such commencement, shall be a citizen of India. Shri Ephrain Ezekiel Sherbane has been granted a domicile certificate by the Chief Presidency Magistrate on the ground that he has been residing in this State for over 10 years. The fact that the domicile certificate has been dated 3rd July 1950 would not make any difference for the certificate clearly states that he has his domicile in the territory of India. It is presumed that the Chief Presidency Magistrate had satisfied himself that Shri Ephrain Ezekiel Sherbane had no animus revertendi.

3. The only question relevant for determination is whether he has been ordinarily resident in the territory of India for not less than 5 years immediately preceding the commencement of the Constitution. It is stated that he was out of India from 8th May 1949 to 19th September 1949. The words "ordinarily resident" in article 5 clause (c) do not appear to require that the person should be one who must have been always present in the territory during the period. "The word 'ordinarily' does not mean solely or in the main. It only means regularly and habitually, not casually whether it be for a larger or a smaller portion of the day." (See 15 B.L.R. 68 and Iyer's Law Lexicon 920). The words "ordinarily resident" as used in the Municipalities Act do Not

that the person should be one who is always resident in that division or carry on business therein. (See 23 Madras Law Journal 591). It would, therefore, appear that the absence from India of Shri Ephraim Ezekiel Sherbanee for some months during the period of 5 years immediately preceding the Constitution would not disqualify him from acquiring the Indian citizenship. In the circumstances, it appears that there would be no legal objection to considering Shri Ephraim Ezekiel Sherbanee as an Indian citizen.

Sd/- P.M.Lad.
17.1
Remembrancer of Legal Affairs.

U.R. to Passport Office, No. 1180 , dated the 18th January 1951.

V.M.D./17.7
4c.

Office of the R.L.A.

Under clause (1) of Article 203 of the Constitution so much of the estimates as relates to expenditure charged upon the consolidated Fund of a State shall not be submitted to the vote of the Legislative Assembly. In the same clause it is however provided that the discussion in the Assembly of the estimates will not be barred. Clause (2) of the said Article provides that so much of the said estimates as relates to other expenditure shall be submitted in the form of demands for grants to the Legislative Assembly; and the Legislative Assembly shall have power to assent, or to refuse to assent to any demand subject to a reduction of the amount specified therein. Sub-clause (3) which follows next is important for the consideration of the present question. Under that sub-clause no demand for a grant shall be made except on the recommendation of the Governor . This sub-clause provides that the Governor as one in whom the Executive power of the State is vested must recommend every demand for a grant. The sub-clause thus enacts the well known principle of public finance that no proposal for imposition of taxes or for the appropriation of public revenues or affecting or imposing any charge upon these revenues can be made except on the responsibility of the Executive. The Executive is thus responsible for the expenditure incurred from the public revenues and it follows that the Executive should have the final voice in the matter of all items of expenditure which have to be submitted to the vote of the Assembly. Indeed, this position has been tacitly admitted in the speech of the Finance Minister of the Government of India, the Hon'ble Dr. John Mathai. When on 23rd December 1949 a motion was made that supplementary sum not exceeding Rs. 1,16,30,000/- be granted to the Governor General to

defray the charges which would come incourse of payment during the year ending 31st day of March 1950 in respect of 'Constituent Assembly' the Speaker in the course of the debate on the motion made the following statement:

"" When the Speaker or the President of the Constituent Assembly sends his proposals, the Finance Ministry may look into them and discuss them, but ultimately in regard to the desirability or necessity of a particular item of expenditure the opinion of the Speaker or the President will prevail." After the Speaker had made the above statement the Finance Minister was asked by Pandit Hirday Nath Kunzru whether he had consulted the President with regard to the details of the expenditure. In reply to that the Finance Minister said that he satisfied himself that the expenditure was reasonable and that it was sufficiently scrutinised by the inner machinery set up by the Constituent Assembly. In reply to ~~another~~ another question from Pandit Kunzru the Finance Minister made the following statement:-

"When proposals of this kind come before the Finance Ministry, there are various ways in which the Finance Minister can satisfy himself. He might do a certain amount of arithmetic on the proposals. In some cases, he might satisfy himself about the authority or the source from which these proposals come. He might satisfy himself on the ground of the scrutiny that has already been made by some competent authority in whose judgment he has confidence. It is in all these ways that the Finance Minister exercises his judgment." It would be apparent from the above statement of the Finance Minister that ultimately the Finance Minister has to exercise his judgment and satisfy himself about the proposals made by the Speaker, in regard to any expenditure to be incurred for the Constituent Assembly. The Finance Minister will naturally consult the Speaker and give due weight to his proposals;

but the final voice would be that of the Governor acting on the advice of the Finance Minister. This position is consistent with the provisions of Article 203 of the Constitution. Any convention as suggested in the Punjab Governor's letter at page 1 ante cannot therefore be established Consistently with the position explained above.

Sd/- P.N.Lal.
18.1

Remembrancer of Legal Affairs.

U.O. to P. & S.D. No. 1269, dated the 19th January '51.

V.M.D./17.7
4c.

Legal Department.

The proposed article 79A refers to the Secretariat of the Dominion Parliament and article 163A to the Secretariat of the State Legislature. The gist of the two articles is that the appointment and conditions of service of the officers and servants of the Secretariates of the Legislature should be made and laid down by the heads of the Legislatures and not by the Executive Government. It is not clear what grounds really exist for the insertion of such provisions in the constitution and whether at all such provisions are necessary or justified. It is understood that these changes are proposed in response to certain discussion which took place at the last conference of the Presidents and Speakers. The proceedings of that conference are not available as yet.

2. The proposal contained in the two articles is quite distinct from the system followed at present in the Central Legislature and recently initiated in the Bombay Legislature. According to that system the Department or Secretariat of the Legislature is separated from the Departments of Secretariat of the Executive Government. According to the Bombay Rules, (a copy of which is kept in these papers) which are made under section 241 of the present Government of India Act, 1935, the President and Speaker form a Board. The Legislature has a full time Secretary and Assistant Secretary who have nothing to do with the Departments of the Executive Government. Subject to the authority of the Governor, the Board has full control over the staff and administration of the Legislature Department. The Secretary and Assistant Secretary are to be appointed by the Governor after consultation with the Board. The members of the ministerial staff are to be appointed by the Board. But the pay, allowances,

and ....

and other conditions of service of the whole staff including the Secretary and Assistant Secretary will be determined by the Governor. It will appear from the rules that although the heads of the Legislature have voice and are entitled to be consulted in the appointment of the principal officers such as Secretary and Assistant Secretary, the appointment is to be made by the Governor i.e. with the aid and advice of the Ministers. The scheme has worked well in the Central Legislature since 1929 and in Bombay it was introduced in 1948. The rules were actually published in January 1949. The scheme has worked well and no defects have been discovered or come to notice in its working. None can contend that the scheme in any way affects or impairs the efficient and independent working of the Legislature Departments from the point of view of members of the Legislature or the public with whom the Department comes in close contact.

3. It is no doubt true that there are provisions in the present Government of India Act and also in the draft Constitution which provide that the appointments shall be made and the conditions of service of officers and servants shall be regulated by an authority other than the Governor. For special reasons and in order to maintain the independence of the highest judicial tribunals viz. the Federal Court and the High Court, provisions exist in the present Government of India Act, 1935 and have been inserted in the draft Constitution providing that the officers and servants shall be appointed by the Head of these Courts (see section 242 (4) of the Government of India Act, 1935 and article 122 and 205 of the draft Constitution) It is difficult to say whether the same reasons exist in the case of the Legislature Secretariat.

4. In order to facilitate the completion of the scheme of the independence of the Federal Court and

and the High Court, it has been expressly provided in the present Act as well as the draft Constitution that the administrative expenses including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court shall be charged to on the revenues of the Dominion or the Province as the case may be (cf. section 216 and 223 of the present Act, articles 122(2) and 205(2) of the draft Constitution). The legal effect of the above provisions is that Governor General or Governor in the present Constitution is, and the President and the Governor in the new Constitution will be, bound to include such expenses in the annual budget and such expenses shall not be subject to the vote of the Legislature, although discussion can take place thereon. Such provisions is absent in the proposed articles 79A and 169A. It is not known what reasons weighed with the promoters of the above amendments in omitting charging provisions. Probably it was considered that the Legislature itself will not view with much favour the idea that their own department should be taken away from their vote. If that is the reason which has influenced the omission of charging provision, the scheme of securing the so called independence of the Legislature will not be completed. It is no doubt true that both the proposed articles contain provisos which provide that the salaries, allowances and pensions of the officers and servants of the Legislatures are to be p paid in consultation with the President in the case of the Dominion Parliament and the Governor in the case of the Provincial Legislature. But that will not be sufficient for compelling the Head of the Executive to include that item in the budget. If a cut motion is moved against such expenditure, the Executive Government may not willingly support it. If therefore the proposed articles are to be included in the draft Constitution, it will be necessary to

to provide that the expenditure to be incurred in respect of the Legislature Department should be charged on the revenues. It may no doubt be noted in this connection that clause (2) of both the articles provide that the conditions of service of the offi cers and servants of the Legislature may be regulated by an Act of the Legislature but this clause does not relate to the appointment of such officers and servants. Although the Legislature may have therefore control over the conditions of service, it has no control over the appointment.

5. Various difficulties in actual practice are likely to arise, if the proposed articles become part of the Constitution. If any questions were asked or discussion takes place in regard to the officers and servants of the Legislature who is to answer their questions or give a reply ? The Speaker or Chairman being in the Chair will not be able to answer the questions or take part in the discussion. It is understood that a convention is observed in Central Legislature that such questions are not to be put or discussion is not to be raised on the floor of the House. The members seeking information or intending to raise discussion see the Speaker in his chamber and tries to get an explanation. But conventions cannot be a part of the Constitution.

6. On the whole the practice which is followed in the Central Legislature and which has been recently initiated in the Bombay Legislature is suitable from all points. Although it maintains the ultimate authority of the Governor i.e. Government over the Legislature Department, in actual practice it secures the separation of that department from other departments of the Executive Government and ensures the impartiality and independence from the public point of view.

7 .....

7. In England the principal officers of the House of Commons are the Clerk of the House, the Sergeant at arms, the Clerk Assistant and the Second Clerk Assistant. The Clerk of the House of Commons and his assistants are appointed by the Crown, the clerk by letters patent and his assistants by sign manual. The Clerk of the House is the head of his Department and makes other appointments. The Speaker has his own personal staff such as his Secretary, who is appointed by him.

Sd/- P.N.Phurandhar.
8.7.49.

V.N.D./13.7
49.

Legal Department.

Constitution of India. Article 15(1).

Attention is invited to R.L.A's opinions No. 99-L dated 11.10.50 and No. 546 dated 10.1.51. In view of Article 15(1) of the Constitution it would no longer be feasible to grant the scholarships only to students of the domicile of this State and the relevant rules will have to be amended, and the student of the Elphinstone College in question will have to be considered for the award of the merit scholarship. It would, however, be desirable to await the decision of the Supreme Court in the Madras Communal G.O. case.

Sd/- J.R.Dhurandhar.
5.2.

Additional Secretary to Government.

U.R. to E.D. thro' P. & S.D. No. 2279, dated the 6th February 1951.

V.M.D./18.7
40.

Legal Department.

Rules of Business, rule 12: whether it is necessary to empower Superintendents to sign orders of Government.

In accordance with the recommendations of the Administrative Enquiry Committee, the P. & S.D. has issued orders (vide G.R. No. 3063/46 dated 21.9.1950) directing that Superintendents of Branches in the Departments of the Secretariat should inter alia sign reminders, ad interim replies and other very minor references. The question raised for consideration appears to be whether in order to give effect to these orders it is necessary to empower the Superintendents under rule 12 of the Rules of Business.

2. The Rules of Business have been made under Article 166 of the Constitution. Under para. (1) of that Article all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. Rule 12 of the Rules of Business accordingly provides that save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Bombay, every such order or instrument shall be signed by either a Secretary, a Joint Secretary, a Deputy Secretary, an Under Secretary or an Assistant Secretary to the Government of Bombay and such signature shall be deemed to be the proper authentication of such order or instrument. There does not appear any objection, as stated by the P. & S.D. at 'A' on page 6 ante to even a Superintendent being empowered under rule 12; but that rule is attracted only in the case of orders emanating from Government and expressed in the name of the Governor. It does not appear that communications such as reminders can be said to be 'orders' of Government unless of course a reminder is issued by order of the Governor . A Superintendent of a branch of a Department of the Secretariat cannot sign an order or instrument of Government unless he is specially empowered in this behalf under rule 12. No general

opinion .....

opinion can however be expressed as it will al depend upon whether the document to be signed is or is not an order or instrument of Government.

Sd/- J.R.Dhurandhar.
S.2.
Additional Secretary to Government.

U.O. to P. & S.D. 2269, dated the 6th February 1951.

V.N.D./18.7
4c.

Legal Department.

The provision regarding age limit of 25 years contained in rule 32 of the Bombay Civil Service Rules does not apply to the appointment of a Judge of the City Civil Court. It is for Home Department to decide what rules should be made for the City Court Judges.

Sd/- J.M.Dhurandhar.
20.2
Secretary to Government.

U.O. to H.D. No. 137-Confl, dated the 20th February 1951.

V.M.D./13.7
Lo.

Office of the R.L.S.

The question raised in this case has been considered in America in the case of "Mutual Film Corporations vs. Industrial Commission of Ohio." Section 11 of article 1 of the Constitution of Ohio guarantees freedom of speech and publication. A statute was passed by the State of Ohio imposing censorship on motion pictures. Section 3 of that statute made it the duty of the Board to examine and censure motion picture films to be publicly exhibited and displayed in the State of Ohio. The films were required to be exhibited to the Board before they were delivered to the exhibitor for exhibition. Section 4 of that statute provided that only such films as were in the judgment and discretion of the Board of Censors, of a moral, educational or amusing and harmless character should be passed and approved by such Board. By section 7 of the statute a penalty was imposed for each exhibition of the film without the approval of the Board. It was urged that the statute violated the freedom of speech and publication guaranteed by the Ohio Constitution. The Supreme Court of America rejected the argument. The Supreme Court held that the argument is wrong or strained which extends the guarantee of free opinion and speech to the multitudinous shows which are advertised on the bill boards of cities and towns, and which regards them as emblems of public safety and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion. In that case the Supreme Court has further observed as follows:-

" It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, as part of the

press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid , useful and entertaining, no doubt, but, capable capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."

In another case "Mutual Film Corporation of Missouri vs. George H. Hodges" which arose under a Kansas Statute censoring moving picture films, the Supreme Court of America has taken the same view. Following the American decisions, which are applicable to the present case, it can be safely said that the freedom of speech and expression guaranteed by article 19(1) (a) of the Constitution is not repressed in the exertion of the power taken to control exhibition of films. Moreover, once the law relates to decency or morality, it is completely taken out of the purview of article 19(1)(a), and from that point of view also, the great majority of the "suggestions" would be saved.

Sd/- P.P.Lal.
23.1

Remembrancer of Legal Affairs.

U.O. to H.D. No. 1526, dated the 24th January 1951.

V.H.D./18.7
40.

Legal Department.

Part III of the Constitution of India relates to "fundamental rights". Article 13(1) of the Constitution provides that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. Article 19 of the Constitution describes the rights regarding freedom of speech etc. Clauses (2) to (6) of the said article 19, however, empower the State Government to impose, in the interest of general public, reasonable restrictions on the exercise of the rights conferred by sub-clause (1) . It is difficult to say at this stage what view the Courts will take about the scope of the various fundamental rights and of the limitations attached thereto. It was not, therefore, considered advisable, while adapting the Central or the Provincial Acts, to omit or modify any provision of law on account of article 13(1) and other articles contained in Part III of the Constitution. Where any question arises whether any provision of any law in force in the territory of India immediately before the commencement of the Constitution is inconsistent with the provisions of Part III and therefore, void, it has been left to be decided by the Courts in each case. No Central or Provincial Acts have been examined with a view to make them consistent with the provisions of Part III of the Constitution.

Sd/- J.P.Dhurandhar.
8.2

Additional Secretary to Government.

U.R. to D.D. No. 2524, dated the 9th February 1951.

V.M.D./13.7
40.

~~219.183.~~

Legal Department.

Constitution of India.

The question involved in this case is pending decision in the Supreme Court in a case from Madras. It will be desirable to await the decision in that case. If however, as suggested by Hon'ble the Chief Minister the scholarships are kept open to all the communities, with a proviso that if a backward community candidate wins one of the scholarships reserved for the said communities, the loan scholarships would be withdrawn, the scheme would not be ~~thereby~~ liable to be challenged on the ground of discrimination.

Sd/- J.R.Dhurandhar.
17.2
Secretary to Government.

U.R. to E.D. No. 2071, dated the 19th February, 1951.

V.M.D./16.7
/c.

Legal Department.

The mere fact that Shri Mirza has been declared an evacuee will not operate to deprive him of his citizenship of India. It appears from these papers that Shri Mirza is likely to complete on 7th March 1951 the period of sixty days of absence from the Assembly without permission of the House and if so, action for declaring his seat vacant can be taken under Article 190(4) of the Constitution.

Sd/- J.R. Dhurandhar.
8.3
Secretary to Government.

U.R. to B.L.D., No. 3850-A, dated the 7th March 1951.

V.M.D./18.7
4c.

Office of the R.L.A.

Under sections 51(3) and 65(4) of the Government of India Act, 1935, only the salaries of the Ministers and the President and the Speaker were required to be determined by an Act of the Legislature. Accordingly their salaries were determined by the Bombay Ministers Salaries Act, 1937 and the Bombay Legislative Council (President and Deputy President) and the Bombay Legislative Assembly (Speaker and Deputy Speaker) Salaries Act, 1937. No law was required to be made for determining their allowances including travelling allowances, as in the case of members of the Legislature under section 72 of the Government of India Act, 1935. It was, therefore, possible to determine their travelling allowances in the past by executive orders. But under articles 164(5) and 186 of the Constitution if any change is to be made in the allowances of the M.Ms., M.S. and M.S. it will have to be done by the Legislature by law. No change can therefore be made in the travelling allowances rules applicable to them by executive orders. The presumption made in para. 3 of P. & S.D. note at page 8 ante is not correct.

Sd/- J.R.Dhurandhar.
2.3.
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 3705, dated the 3rd March 1951.

V.M.D./18.7
&c.

Legal Department.

Constitution of India, Article 173 & 191(1)

The question raised for the R.L.A's consideration is whether the primary school teachers can stand for election to the Legislature. Article 173 of the Constitution of India prescribes qualifications for membership of the State Legislature. Article 191 clause (1) specifies the disqualifications for membership, one of which is that a person who holds any office or profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder, would be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State. A Primary School teacher is not a servant of the State although Government has been paying more than 90% of the expenditure on such teachers to the School Boards as contribution. Consequently if a primary school teacher possesses the qualifications prescribed by article 173, there would be no legal objection to his contesting for membership to the Legislature provided he is not otherwise disqualified on any other ground specified in article 191. However, the Bombay Civil Services Conduct, Discipline and Appeal Rules have been applied mutatis mutandis to the primary school teachers. Rule 30 sub-rule (3) of these rules prohibits a Government servant from publicly announcing himself or allowing himself publicly to be announced as a candidate or a prospective candidate for election to a legislative body. If a primary school teacher stands as a candidate for election to the State Legislature,

in contravention. ...

in contravention of rule 30, sub-rule (3), he would be liable to be dealt with under rule 33 which prescribes the punishements to be imposed and such punishment may extend to dismissal from service.

Sd/- J.R. Dhurandhar.
12.2

Additional Secretary to Government.

U.R. to E.D. No. 2761, dated the 13th February 1951.

V.H.D./18.7
4c.

Legal Department.

There is no objection to accepting the Government of India's proposal for the entrustment of functions in relation to the acquisition of land. Since under clause (3) of Article 258 of the Constitution the State is entitled to extra costs of administration incurred by the State in connection with the exercise of powers and duties entrusted it is doubtful if the Government of India will agree to entrust their functions generally in respect of all lands as proposed in the Revenue Department draft letter at page 19 of correspondence section. Perhaps the Revenue Department may restrict their suggestion to requisitioned lands referred to in section 5 of the Requisitioned Land (Continuance of Power) Act, 1947.

Sd/- B.D.M.
Additional Secretary to Government.

U.O. to R.D., No. 4014, dated the 20th March 1951.

V.V.D./18.7
4c.

Legal Department.

Attention of the Finance Department is invited to item No. 28 in the Statement showing the action required to be taken by the various Departments of the Secretariat in connection with the new Constitution of India forwarded to it by the Political and Services Department with its endorsement No. 3545/46-H, dated the 9th January 1950. The Finance Department is requested to state if any action has been taken by them regarding the law to be made for regulating the procedure in the State Legislature for the purpose of timely completion of financial business.

Sd/- S.L.Chaudhari.
15.4
Assistant Secretary to Government.

U.R. to F.D. No. 5306, dated the 19th April 1950.

V.M.S./13.7
4c.

Legal Department.

The provision in article 31(6) of the Constitution which provides for the certificate of the President is in the nature of a temporary provision intended to remove doubts regarding enactments passed within a period of 18 months before the Constitution came into force. The Rules of Business would not obviously provide for such matter. It would be more appropriate for the administrative Department concerned to move the Government of India in this matter.

2. R.D. draft at p. 5 does not correctly state the position. It should be stated in the draft that the six enactments concerned provide for the award of adequate compensation any rights in land, which are extinguished and do not in fact contravene the provisions of section 299 of the Government of India Act, 1935. They were assented to by the Governor General after a full consideration. But to remove any possible doubt on the point, they are being submitted to the President for certification. R.D. is requested to show the final draft to L.D. before despatch.

Sd/- J.R.Dharandhar.
6.3

Additional Secretary to Government.

U.O. to R.D. No. 3176, dated the 7th March 1950.

V.M.D./15.7
Lc

Office of the R.L.A.

Messrs. Kanga and Co., Solicitors, state that an agreement had been entered into between the trustees of the Seth Chunilal Sankalchand trust fund and the Baroda Government whereunder the latter had agreed to run the school on the terms and conditions embodied in the High Court decree. Whatever that may be the Government of Bombay, as the successor to the Government of Baroda, is not bound to recognize that agreement. Secondly, it is admitted that it is not now possible to run the school with the income derived from the trust fund; and that Government aid will be necessary if the school is to be continued. But as pointed out by the R.L.A. in his opinion dated the 14th November 1950 (page 7 ante.) Government cannot, under the Constitution, offer aid to a school which admits only girls of a particular community. Apart from that provision in the Constitution, the merger agreement with the Ruler of Baroda does not also provide for the recognition of such agreements or arrangements. There appear, therefore, to be sufficient reasons for the decision taken by Government and the orders issued by Government in their letter dated the 29th January 1951 (page 61 of the correspondence section) appear to be free from objection. There does not, therefore, appear any force in the contention raised by Messrs. Kanga and Co., that the Government of Bombay is bound to continue to run the school.

Sd/- J.R.Dharandhar.
22.3
Remembrancer of Legal Affairs.

U.H. to E.D. No. 4654, dated the 22nd March 1951.

V.M.P./13.7
4c.

Office of the R.L.A.

The question raised for consideration by H.M., P.W.D., in his minute dated the 14th December 1950 at page 123 ante is whether in the case of a permanent officer taken over from a merged State who serves the Bombay Government for a number of years but remains unabsorbed on account of administrative reasons, such officer can be discharged on the ground of inefficiency by giving him a notice but without giving him the benefit of an enquiry into the allegations against him, as contemplated by article 311(2) of the Constitution. In this connection it is urged that if the merged State had continued to maintain a separate existence, such officer would have been entitled to an enquiry before discharge and, therefore, the merger should not justify withdrawal of a right which such officer had.

2. When a State voluntarily merges into another State, it loses its independence and becomes a part of another. Whatever rights a subject or servant had against his State would not be binding on the latter State, unless they are recognised by agreement or appropriate legislation. Cf. Syed Asrar Ahmed vs. The Durgah Committee, Ajmer 49 Bom. L.R. Supra 235 at page 238. In this case, the relevant provision of the agreement made between the Governor General of India and His Highness the Maharaja of Baroda on 1st March 1949 is article VIII(1) of the agreement. It reads as follows, namely

> "VIII(1) The Government of India hereby guarantees either the continuance in service of the permanent members of the Public Services of Baroda on conditions which will be not less advantageous than those on which they were serving before the date on which the administration of Baroda is made over to the Government of India or the payment of reasonable compensation."

3. All that is guaranteed by the agreement to public servants of the merged State is continuance in service on conditions not less favourable or payment of reasonable compensation. Accordingly Government has made rules given in Government Resolution, Political and Services Department, No. 2735/46, dated the 18th July 1949 for payment of

compensation to servants of the merged and intergrated States who cannot be absorbed in Bombay Government Service. As pointed out in H.L.A's opinion No. 16624, dated the 25th November 1950 at page 125 ante, it is true that after merger some State servants continue to hold offices, but that fact alone would not make them servants of the State of Bombay to attract the operation of article 311(2) of the Constitution, until definite orders are passed for their absorption in the Bombay Government Service. It will thus be seen that such servants cannot as a matter of right claim the benefit of a departmental enquiry into the allegations against them, if they are discharged on the ground of inefficiency before their absorption in the Bombay Government Service. They would, however, be entitled to claim compensation as provided in the said Government.-Resolution of 18.7.1949.

Sd/- J.R. Dhurandhar.
21.3
Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 290-Confl, dated the 16th March 1951.

V.H.D./18.7
4c.

Office of the R.L.A.

With reference to the Political and Services office note dated the 6th March 1951 at pregage, attention of that Department is invited to R.L.A's opinion No. 290-Confl., dated the 16th March 1951, on the position of Indian State servants who have not been absorbed in the Bombay Government service.

Sd/- J.R.Dhurandhar.
17.3
Remembrancer of Legal Affairs.

U.R. to P. & S.D., NO. 295-Confl, dated the 19th March 1951.

MmR.
V.M.D./18.7
Ac.

Office of the R.L.A.

Clause (3) of Article 202 of the Constitution of India does not specify expenditure on account of the travelling allowance and honorarium to the President and member of the Revenue Tribunal as expenditure charged on the Consolidated Fund of the State. Neither is such expenditure declared by the Constitution or by any law of the State to be so charged. The view taken by the Finance Department that the expenditure referred to will have to treated as "vote" is therefore correct.

Sd/- J.R.Dhurandhar.
29.3
Remembrancer of Legal Affairs.

U.O. to R.D., No. 5204, dated the 2nd April 1951.

V.M.D./12.7
&c.

Office of the R.L.A.

Relevant laws in force in the United States of America and the United Kingdom have been looked into. There is no law in the U.S.A. under which criticism or abuse of the President or any members of his Cabinet is made per se punishable.

2. As regards the position in U.K. the law has been briefly stated in the judgment of Tek Chand, J. in the case of Diwan Parkash v Emperor, A.I.R. 1937 Lahore 520. In that judgment Tek Chand, J. says: "It is hardly necessary to say, that in England the party in opposition is constantly criticising the ministry in power for the time being, and by speeches and writings is trying to bring it, as well as its individual members, into hatred and contempt, so as to bring about their early downfall. And yet it has never been suggested that such speeches or writings are indictable as sedition." The Judge refers to the standard work of Odgers on the Law of Libel and Slander and quotes from him the following passage:-

"It is clearly legitimate and constitutional to endeavour by means of arguments, addressed to the people, to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into disesteem and to alienate from them the affections of the people." In England also there is no law under which speeches and writings criticising or abusing ministers are made per se punishable.

Sd/- J.M.Dhurandhar.
24.3
Remembrancer of Legal Affairs.

U.R. to H.D.NO. 4756, dated the 26th March 1951.

Office of the R.L.A.

Clause (2) of article 343 of the Constitution provides that notwithstanding anything in clause (1), for a period of 15 years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement;

Providedthat the President may, during the said period by order authorise the use of Hindi language in addition to the English language and of the Devnagari form of numerals in addition to the international form of Indian numerals for any of the official purposed of the Union.

It is indisputable that the publication of the electoral roll for Parliament as well as for the Legislature of a State is an official purpose of the Union. Entry 72 in the Union List covers that purpose. In printing names the only aspect of language to be considered is that of the scriptp but script is an integral part of a language as is apparent from clause (1) of article 343 itself which describes the official language of the Union as Hindi in Devanagari script. Moreover, regulation 1 (5) of part II of the Legislative Assembly (Bombay) Electoral Revision and Publication of Electoral Rolls Regulations and rule 17 of the Bombay Legislative Assembly Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936, make it clear that in this context the printing in English (i.e. Roman

Script and numerals, with the Roman alphabetical order) is regarded as preparation in English language. Both the above quoted rule and regulation, lay down that in respect of a Bombay City Constituency, for the Central Legislature as well as the Provincial Legislature the roll shall be prepared in English. Those were the rules immediately in force before the commencement of the Constitution, the rolls for the sc. Constituencesx were in English; It is therefore obligatory to publish the rolls in English both for Parliament and for the State Legislature in respect of the Bombay City Constituency; and the roll being now common no distinction can be made in practice with reference to Parliament and a State Legislature. Besides, even under article 343 (2) the form of numerals has to be the international form of Indian numerals and numerals are an important part of a roll, the proviso to clause (2) thus enables the President to prescribe the Hindi language and the Devnagari form of numerals in addition to and not in substitution of English, wherever English was used for such official purpose of the Union. The power given to the Election Commission by rule 6 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1950, to direct the form of the language or languages in which the electoral roll for each consituency shall be prepared is of course subject to the provisions of the Constitution which is a paramount document; and it will not be constitutionally feasible for the Election Commission to direct that in the Bombay City Constituency the roll shall be prepared in any language other than English. That being so, I am of opinion that we should

abide by the instructions now given by the Election Commission to prepare the roll in English for Greater Bombay; for I understand, the constituencies particularly for Parliament are proposed on a basis which would make it impossible for the roll to be prepared in English only for a Bombay City Constituency. There is no constitutional objection to preparing the roll for the areas outside the Bombay City in English; since the use of English is guaranteed and not the use of any other language.

Sd/- P.M.Lad.
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 200, dated the 4th January 1951.

V.M.D./19.7
4c.

Office of the R.L.A.

Having regard to the aims and objects of the Institute and the fact that the office to be held by H.M. will be honorary only it does not appear that there can be any objection to H.M. becoming the member or the vice-president of the asso. But in view of the observations of Hon'ble the Premier made on the occasion of the debate on the Ministers Salaries Bill (quoted in R.L.A.'s No. 6335, dated 6.7.48 on a similar question) it would be for the H.M. to decide whether he should agree to be the member or vice-president of the Institute.

Sd/- J.R.Dhurandhar.
17.4
Remembrancer of Legal Affairs.

U.R. to L.S.G. & P.H.D.,No. 6335, dated the 20th April 1951.

V.M.D./18.7
4c.

Office of the R.L.A.

Legislation in respect of Public Order.
—
Constitution of India, Art. 19.

The main judgment of the Supreme Court was delivered in the case of Ramesh Thapper vs. the State of Madras (the Cross Roads Case). In that case the validity of section 9(1A) of the Madras Maintenance of Public Order Act, 1949 was considered. Under that section the State Government was authorised for the purpose of securing the public safety or the maintenance of public order, to prohibit or regulate the entry into or the circulation, sale or distribution in the Province of Madras or any part thereof, of any document or class of documents. The Supreme Court held that the section authorized an imposition of restrictions for the wider purpose of securing public safety or the maintenance of public order and, therefore, fell outside the scope of authorised restrictions under clause (2) of article 19 of the Constitution. In accordance with the judgment of the Supreme Court, unless a law restricting freedom of speech and expression is directed solely against undermining security of the State or overthrew of it, such a law cannot fall within the reservation under clause (2) of article 19 although the restrictions which it seeks to impose may have been conceived generally in the interest of public order. Nowhere in the judgment has the Supreme Court suggested that the State Legislature is not competent to make a law in respect of the security of the State. According to the Supreme Court, public order is an expression of wide connotation and may include security of State but if a law is made restricting freedom of speech and expression, such a law cannot be valid unless its sole aim and object is against

undermining

undermingin the security of the State or the overthrow of it.

Sd/- J.R.Dhurandhar.
24.2

Remembrancer of Legal Affairs.

U.R. to H.D. No. 234-Confl. dated the 2nd March 1951.

V.H.D./19.7
4c.

Legal Department.

Grants of Rs. 6000/- and Rs. 3500/- are not in the nature of 'aid' to the institution but are yearly payments in satisfaction of obligations undertaken by Government while accepting the donations. As such these payments will not fall within the purview of Art. 29.

The ordinary grant of Rs. 3850 would however be covered by Art. 29 and it would be unconstitutional to pay the grant unless the Institution agrees to throw itself open to all the communities.

There is no necessity of waiting for the intended legislation. If the Institution is in need of the Government grant, it is possible for it to apply to the Court and to have the Instrument of Foundation suitably amended so as to be able to admit students of all communities. (See (1910) Ch. 796 In re Queen's School, Charater).

Sd/- B.D.M.

Additional Secretary to Government.

U.R. to E.D. No. 5316 dated the 2 3rd April 1951.

V.M.D./19.7
4c.

Legal Department.

Constitution of India Article 299(1) Authorisation of camp commandants.

In the absence of clear and positive words in Article 299(1) of the Constitution, it appears that an authorisation thereunder cannot be made restrospectively. Consequently the proposed orders cannot be given retrospective effect.

2. Incidentally, it may be pointed out that fresh orders regarding authorisation has been issued in Government Resolution, Home Department No. 1758/6, dated the 26th January 1950 under Article 299(1) of the Constitution. Reference to orders of 1943 in the draft order at page 11 ante is not in order.

Sd/- B.D.M.

Additional Secretary to Government.

U.R. to R.H.D., No. 6039, dated the 16th April 1951.

V.M.D./19.7
4c.

Office of the R.L.A.

The view taken by the Government of India in the Home Ministry's letter No. 40/20/50-Judicial, dated the 7th August 1950 is supported by the decision of the leading American case of Ex-parte Garland, 4 Wall 333-380 (1866) where the Supreme Court held: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender. It releases the punishment and blots out of existence the guilt so that in the eye of the law the offender is an innocent as if he had never committed the offence. It removes the penalties and disabilities and restores to him all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity." The effect of that decision is not free from dubt and has been commented upon . What the effect of the previsions in article 161 of the Indian Constitution is still to be judicially decided and no useful purpose will be served by entering into a controversy on the subject with the High Court.

2. H.D. may reply to the High Court that the action of the Government in the present case was in accordance with the instructions contained in the letter of the Government of India. It may be pointed out that the case in question was considered to be of an exceptional nature in which the person aggrieved was entitled to the redress of his grievance by the exercise of the powers vested in the Government under article 161. The Government however, does not desire to enter into discussion with the High Court as regards the legal effect of the exercise of the said power. The final decision of that question will be given by a competent authority if and when the question arises.

Sd/- J.R.Dhurandhar.
20.4
Remembrancer of Legal Affairs.

U.R. to H.D. no. 6496, dated the 23rd April 1951.

Office of the R.L.A.

Attention in this connection is invited to R.L.A's opinion No. 13587, dated 26th September 1950, where it is held that Article 316 of the Constitution itself fixed the tenure and making an acting appointment in place of a member (or chairman) who has proceeded on leave would be inconsistent with this article which does not contemplate an acting appointment as in the case of High Court Judges. This view is confirmed by the Central Government in their letter dated 7th February 1951. The doubts expressed by Shri P.G.Shah have no substance.

Sd/- J.R.Dhurandhar.
25.4
Remembrancer of Legal Affairs.

U.R. to P. & S.D. No. 6797, dated the 26th April 1951.

M.R./19.2
V.M.D./19.7
4c.

Legal Department.

Constitution of India.

Articles 14, 15, 29(2).

The Constitution does not prohibit discrimination in in respect of admission to educational institution in the State on the ground of domicile. Reservation of seats for students from outside the State and also for students from overseas will not offend against articles 14, 15 or 29(2) of the Constitution. (See R.L.A's Opinion No. 6558, dated 24th April 1951).

Sd/- B.D.M.
Additional Secretary to Government.

U.R. to R.D. No. 6979, dated the 2nd May 1951.

V.M.D./19.7
&c.

Legal Department.

It appears that the Government of India propose to enter into a Treaty of Commerce and Navigation with Iran and have given the Iranian Government a draft of Treaty, a copy of three articles of which is sent to the Bombay Government to consider the efficacy of the proposed draft clause in ensuring reciprocal treatment against the Iranians in India for disabilities suffered by Indians in Iran. H.D. in its office note state that the Treaty only gives national of Iran equal rights with citizens of India subject to the condition that Indian Nationals in Iran are similarly treated, and such an arrangement would not appear to be ultra vires of the Constitution Secretary H.D. in his note observes: " The point is how that status is to be given. I suppose the Parliament will pass the necessary law to give effect to the Treaty. P.L.A. may see."

Articles 7 and 12 of the extract of the Draft Treaty of Commerce and Navigation between India and Iran at page 5 ante are free from any objection. Article 8 provides "subject to the reciprocal treatment the nationals of either contracting party shall in the territory of the other have the same access to the courts and be entitled to the same equality before the law as is accorded to the nationals of the other with respect to their person, proprietorial, contractual and other rights and interests." As the article stands, it is in no way inconsistent with any of the provisions of the Constitution of India, but that does not appear to be material for what is important is whether in the event of the Iranian Government committing the breach of this article the Indian Government can withdraw the protection provided by this article to the ~~fnumdim~~ Iranian nationals in India. Iranian nationals when they are admitted into India would be entitled to certain rights under the Constitution other than those which are

specially guranteed to citizens of India. Under the Constitution, some of the provisions relating to fundamental rights are limited to citizens such as xxiiixx article 15, 16, 19, 29 and 30 while the rest of the provisions of Part II of the Constitution are applicable to citizens and aliens alike that is to say to all persons residing within the territory of Indian for the time being and subject to its jurisdiction, that is, protection of life and property. See article 21. Article 14 which applies to citizens and aliens alike provides the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 21 which also applies to citizens an aliens alike provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. In the words of Jennings (Jennings Law of Constitution 3rd Edition Page 49)" equality before the law" means " the right to sue and to be sued, to prosecute and be prosecuted for the same kind of action should be the same for all citizens of full age and understanding and without distinction of race, religion, wealth, social status or political influence ." Under this principle of equality before the law the aliens are entitled to sue in the courts though departable. See Wills on Constitutional Law, page 235. Consequently, "equality before the law" is guaranteed under the Constitution to aliens as well as citizens. In the face of this guarantee, it would not be legally possible for Government to withdraw the protection accorded to the Iranian Nationals under article 8, even in the event of such protection xxxx being withdrawn from the Indian Nationals in Iran by the Iranian Government that is to say even when the ~~Iranian~~ Iranian Government commits a breach of article 8. It would therefore follow that article 8 would not serve any useful purpose in securing reciprocal treatment to Indian Nationals in Iran under the

threat of reciprocity as the equality of treatment is guaranteed to the Iranian nationals under the Constitution irrespective of the fact whether or not the Iranian Governments extend such protection of law to the Indian Nationals in Iran.

2. Article 51 contemplates international treaties and under article 253 power vests in Parliament to legislate for giving effect to such international agreements and treaties. It would, therefore, be competent for Parliament to legislate in terms of the draft treaty between Iran and India. But legislation in terms of article 8 of the proposed treaty that the equality before the law is extended to Iran under reciprocal agreement will not be necessary as the Constitution already gives equality before the law to aliens also. Under item 17 List 1 of the Union List, the Parliament has power to legislate in respect of aliens. Consequently in the event of the breach of article 8 of the draft treaty by the ~~Iranian~~ Iranian Government, the Parliament will have to legislate imposing such disabilities on the Iranian nationals in India as would be permissible under the Constitution and Government cannot merely rely on the reciprocity agreement.

Sd/- B.D.M.
Additional Secretary to Government.

U.R. to M.P. No. 6620, dated the 28th April 1951.

V.M.D./19.7
4c.

Legal Department.

The view taken by Political and Services Department is correct.

According to English Law, "the fact that a wife actually lives apart from her husband, that they have separated by agreement, that there has been a judicial separation, that the husband has been guilty of misconduct, such as would furnish defence to the suit by him for restitution of conjugal rights, does not enable the wife to acquire a separate domicile," as the domicile of a married woman is during the coverture the same as, and changes with, the domicile of her husband. (See Dicey's Conflict of Laws, sixth edition, page 107). It, however, appears that according to the modern American authority, a wife may establish a separate domicile whenever she lives apart from her husband without being guilty of desertion under the law of the State which was the common domicile at the time of the separation, and it is not necessary that she should have cause for divorce. (See ibid p. 107). However, under section 16 of the Indian Succession Act, 1925, a wife's domicile during her marriage follows the domicile of her husband. Even though the wife is deserted by her husband the marriage is not dissolved. Consequently, a deserted wife still retains the domicile of her husband. Consequently, the view taken by the Presidency Magistrate that Mrs. Annie Cabby was deserted by her husband and has been residing in India since 1939 would entitle her to separate domicile in India is not correct.

Sd/- B.D.M.

Additional Secretary to Government.

U.O. to Passport Office, No. 6907, dated the 1st May 1951.

V.M.D./19.7
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